In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 385

STATE OF CALIFORNIA,
Petitioner,

vs.

HARRY TAYLOR, PETER A. CALUS, JAMES W. BREWSTER, et al.,
Respondents.

REPLY BRIEF FOR PETITIONER.

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Topical Index

	Page
Preliminary statement	1
Argument	3
I. Affirmative reasons must exist indicating that Congress intended the general language of the Railway Labor Act to apply to a state	3
A. To avoid considering the evidence bearing upon the intention of Congress, respondents and the United States contend that the Act expressly includes the states	4
1. Incorporation of the general scope of the Interstate Commerce Act does not constitute an express declaration by Congress that a state carrier is subject to the Railway Labor Act	4
B. Reference in the Railway Labor Act to what constitutes interstate railroading, does not satisfy the requirement that the states be expressly named in restrictive statutes	6
1. All authorities interpret statutes requiring employers to engage in collective bargaining as not being applicable to government	7
II. No objectives of the Railway Labor Act indicate that Congress intended the Act to apply to a state	10
A. It is not established that California has operated successfully or otherwise under the 1942 contract, or that public employment in the railroad field can be carried out by collective bargaining	16
III. Contrary to respondents' suggestion, the Eleventh Amendment is a specific limitation on the powers of Congress	19
IV. Respondents contend that a state's employer-employee relationship can be controlled by the federal government in the manner of the Railway Labor Act	24
V. Even if the Railway Labor Act requires a state to collectively bargain, respondents fail to show that their claims are based upon a valid contract	27
Conclusion	28

Citations

Cases

	Pages
Bank of Kentucky v. Wister, 27 U.S. (2 Pet.) 318, amended 28 U.S. (3 Pet.) 431	20
Bank of United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904	20
California v. Anglim, 129 F.2d (C.A. 9) 455	10
Cary v. Curtis, 44 U.S. (3 How.) 236	23
City of Los Angeles v. Los Angeles, etc. Council, 94 Cal. App.2d 36, 210 P.2d 305	14, 26
City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539	18, 26
Creekmore v. Public Belt R. Com., 134 F.2d (C.C.A. 5) 576, cert. den. 324 U.S. 742	16
Duhne v. New Jersey, 251 U.S. 311	23
Ex parte New York, 256 U.S. 490	22
Ex parte Young, 209 U.S. 123	20
Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459	21
Georgia Railroad and Banking Co. v. Redwine, 342 U.S. 299	20
Governer of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110	21
Great Northern Life Ins. Co. v. Read, 322 U.S. 47	21, 22
Guarantee Title & Trust Co. v. Title Guaranty Surety Co., 224 U.S. 152	3
Hagood v. Southern, 117 U.S. 52	21
Hans v. Louisiana, 134 U.S. 1	21
Hopkins v. Clemson Agric. College, 221 U.S. 636	20
Johnson v. Maryland, 254 U.S. 51	25
Kennecott Copper Corp. v. State Tax Com., 327 U.S. 573	22
Kline v. Burke Const. Co., 260 U.S. 226	23
Lincoln Co. v. Luning, 133 U.S. 529	20
Louisiana v. Jumel, 107 U.S. 711	21
Maurice v. California, 43 Cal.App.2d 270, 110 P.2d 706	10
Monaco v. Mississippi, 292 U.S. 313	21
Murray v. Wilson Distilling Co., 213 U.S. 151	22

Pages

New Hampshire v. Louisiana, 108 U.S. 76 21
Nutter v. City of Santa Monica, 74 Cal.App.2d 292, 168 P.2d 741 26

Old Colony Trust Co. v. Seattle, 271 U.S. 426 20
Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 21

Parker v. Brown, 317 U.S. 341 4

Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362 ..... 20, 22
Rocktor, etc. Railroad Co. v. Walling, 146 F.2d (C.C.A. 4) 111, cert. den. 320 U.S. 742 16

Sheldon v. Sill, 49 U.S. (8 How.) 441 23
Smith v. Reeves, 178 U.S. 436 21
State v. Brotherhood of R.R. Trainmen, et al., 37 Cal.2d 412, 232 P.2d 857, cert. den. 342 U.S. 876 ..... passim
State v. Brotherhood, etc. (Cal. App.), 220 P.2d 27 9

Terminal R.R. Assn. v. Brotherhood of R.R. Trainmen, 318 U.S. 1 12
Tindal v. Wesley, 167 U.S. 204 20

United States v. Amer. Trucking Assn., 310 U.S. 534 8-9
United States v. Berger, 66 F. Supp. 950 6
United States v. California, 297 U.S. 175 ..... 4, 7, 9, 10, 25
United States v. United Mine Workers, 330 U.S. 258 ..... 3, 4, 7
United States v. Wittek, 337 U.S. 346 ..... 3, 4, 7

Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515 ..... 12, 28

Constitutions and Statutes

United States Constitution Pages

Article III 23

Article IV, Sec. 4 25

Amendment I 23

Amendment V 23

Amendment XI 11, 19, 20, 22, 23

United States Statutes

Carriers' Taxing Act of 1937, 50 Stat. 435 (for subsequent history, see note 45 U.S.C.A. secs. 261-273, 1954); now substantially contained in 26 U.S.C. (I.R.C. 1954) sec. 3231) 10

District of Columbia Emergency Rent Act, 55 Stat. 788 7

Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C. secs. 201-219 16

Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U.S.C. secs. 51-60 10

Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. sec. 1 5

Norris-La Guardia Act, 47 Stat. 70, 29 U.S.C. sec. 101 et seq. 7

Railway Labor Act

44 Stat. 577 (1926), as amended (full citation to amending statutes is contained in Petitioner's Brief, p. 3, footnote 1), 45 U.S.C. secs. 151-163 ..... passim

45 U.S.C. sec. 151, First 4-5

45 U.S.C. sec. 151a 10

45 U.S.C. sec. 152, First 28

45 U.S.C. sec. 152, Second 6-7, 28

45 U.S.C. sec. 152, Third 6-7

45 U.S.C. sec. 152, Fourth 6-7, 13

45 U.S.C. sec. 152, Sixth 6-7

45 U.S.C. sec. 152, Eighth 6-7

Pages

45 U.S.C. sec. 152, Ninth 6-7
45 U.S.C. sec. 152, Eleventh 14
45 U.S.C. sec. 153, First (h), (i) 6-7
45 U.S.C. sec. 153, Second 6-7
45 U.S.C. sec. 155 28

Safety Appliance Act

27 Stat. 531, as amended, 45 U.S.C. secs. 1, *et seq.* 4, 7, 10

California Statutes

California Government Code:
Sections 18702-18714 28
Section 18853 16
Section 18858 16

State Statutes

New York Law of 1939, c. 927 2

Texts and Encyclopedias

American Law Rep. Ann., 31 A.L.R.2d 1142 8
Rhyne, Labor Unions and Municipal Employe Law, 1946 ..... 3, 6, 15, 18
Rhyne, Labor Unions and Municipal Employe Law Supp. Rep. 1949 ..... 8, 18
Sutherland, Statutory Construction (3d ed.) Vol. 3, sec. 6301 4

Federal Agency Reports

Interstate Commerce Commission 69th Annual Report No. 461 15,
National Mediation Board, 21st Annual Report 1955 ..... 13, 28
National Mediation Board, 22nd Annual Report 1956 13

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PRELIMINARY STATEMENT.

This reply brief also will answer the brief for the United States as amicus curiae filed by the Solicitor General at the invitation of the Court (R. 98). Because the Government's brief presents a new antagonist, armed with new arguments, the reply is of greater length than would otherwise be necessary.

The Solicitor General states that the collective agreement, upon which the instant disputes before the National

Railroad Adjustment Board are based, "was observed by the parties until on or about November 13, 1951" (U.S. Br. 4). Should the validity of the contract or its continuity become pertinent, it should be noted that whether or not the contract was "observed" by the parties and whether respondents rendered service thereunder, were contested issues of fact under the pleadings herein (Pet. Br. 69-71), although the Court below makes the same statement of fact (R. 93, 96).

While the present record does not fully disclose all of the "facts of life" under the contract, it is apparent that from the time the Harbor Board, which succeeded the Board which made the agreement, was appointed, there was controversy over the basic validity of the contract (R. 55). The record shows disagreement over the application of civil service laws vis-à-vis the agreement at least as early as April, 1946 (Taylor Docket 24,211 Pet. Br. 7, R. 99). The date selected for the end of the so-called observance of the agreement, November 13, 1951, is the date on which this Court denied certiorari in *State of California v. Brotherhood etc.*, 37 Cal.2d 412, 232 P. 2d 857, cert. den. 342 U.S. 876, in which California secured a declaratory judgment holding the contract invalid (Pet. for Cert. 22). Obviously, that litigation was initiated by the successor Board years prior to 1951 (R. 55).[1]

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[1]The situation with respect to the instant contract is somewhat like that which faced the City of New York when, in June, 1940, its Board of Transportation acquired ownership of the B.M.T. and I.R.T. subway system and "inherited" collective bargaining agreements with a union, representing the subway employees. Prior to acquisition, the State of New York provided civil service status for these employees (N.Y. Law of 1939, c. 927). A declaratory judgment action was brought to determine the validity of the agree-

ARGUMENT.

I.

AFFIRMATIVE REASONS MUST EXIST INDICATING THAT CONGRESS INTENDED THE GENERAL LANGUAGE OF THE RAILWAY LABOR ACT TO APPLY TO A STATE.

Respondents are correct—petitioners' position is stated in *State v. Brotherhood of Railroad Trainmen*, 37 Cal.2d 412, 416, 232 P.2d 857, 860, which sets forth the well-settled rule "that statutes which in general terms divest preexisting [sic] rights or privileges will not be applied to a sovereign, in the absence of express words to that effect, unless there are extraneous and affirmative reasons for believing that the sovereign was intended to be affected." The opinion relies upon *U. S. v. United Mine Workers*, 330 U.S. 258, 272-273, and *U. S. v. Wittek*, 337 U.S. 346, 358-359. The rule that a restrictive statute will not be deemed to apply to the sovereign unless expressly named therein, at first, was regarded as an exclusionary one (*Guarantee Co. v. Title Guaranty Co.*, 224 U.S. 152, 155-156). It is now a rule of construction, which will be employed unless there are implied or affirmative reasons for believing that the sovereign was also to be included within the restrictive statute.

In a system of dual sovereignty the rule also applies to federal restrictive statutes when it is asserted that the

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ments but was never brought to trial, although it was off calendar for a number of years. The story is told in Rhyne, Labor Unions and Municipal Employe Law, 1946, pp. 116-120, cited by the United States (Br. 12). Speculating upon the judicial attitude, if the case were brought to trial at a later date, the author states: "it may be questioned whether the courts would determine legal questions concerning contracts which have expired or which *have been continued solely to obtain judicial construction.*" (p. 117.) (Emphasis added.)

general language applies to a state (Sutherland, Statutory Construction (3d ed.) Vol. 3, § 6301, p. 185; see *Parker v. Brown*, 317 U.S. 341, 351; cf. *U. S. v. Wittek*, 337 U.S. 346, 358-359). In *U. S. v. California*, 297 U.S. 175, the state contended that the Safety Appliance Act (45 U.S.C. sec. 1 et seq.) did not apply to the State Belt Railroad because the states were not explicitly named in the act (p. 179). The Court, treating the rule as an exclusionary one, refused to extend it so as to exempt a state from otherwise applicable provisions "all embracing in scope and national in purpose" (Pet. Br. 26-27). Today, the case is regarded as holding that general restrictive statutes will not be applied against a state or the federal government unless there are extraneous and affirmative reasons for believing that Congress intended to impose them upon government (*U. S. v. United Mine Workers*, 330 U.S. 258, 272-273).

A. TO AVOID CONSIDERING THE EVIDENCE BEARING UPON THE INTENTION OF CONGRESS, RESPONDENTS AND THE UNITED STATES CONTEND THAT THE ACT EXPRESSLY INCLUDES THE STATES.

1. Incorporation of the general scope of the Interstate Commerce Act does not constitute an express declaration by Congress that a state carrier is subject to the Railway Labor Act.

Respondents and the Solicitor General attempt to avoid the rule that a state will not be deemed included within a restrictive statute unless expressly named therein, by arguing that the State Belt has indeed been expressly included in the Railway Labor Act because of the fact that the act covers all carriers, subject to the Interstate Commerce Act (Resp. Br. 12). The term "carrier" is defined as "any . . . carrier by railroad, subject to the Interstate

Commerce Act" (45 U.S.C. sec. 151; First). The argument then runs—Congress, in the Railway Labor Act, adopted the definition of "carrier" as used in the Interstate Commerce Act, i.e., "common carriers engaged in . . . [t]he transportation of passengers or property wholly by railroad. . . ." (49 U.S.C. sec. 1) and that latter act, in practice, has been regarded as applying to the State Belt. Hence, the Railway Labor Act by "its express terms" applies to the State of California (U.S. Br. 6-7; Resp. Br. 13). Though contrived, the contention has apparent plausibility.

In the first place, the two acts were inter-related for the obvious purpose of providing a consistent approach to what constitutes railroad commerce. It was a compendious way for Congress to declare what type of carriage by rail would be considered as being interstate commerce. Actually, reference to the Interstate Commerce Act, doesn't do any more than to say that common carriers by railroad, if engaged in interstate commerce, are subject to the regulatory provisions of the Railway Labor Act. Both acts are in general terms, so the inquirer who wishes to know if Congress intended to include the states, is left approximately where he started. Quite different it would be, if the Interstate Commerce Act further defined carriers as including carriers operated by a state. But the Solicitor General composes an express declaration of Congress from the fact that the general words of the Interstate Commerce Act have been *interpreted* as applying to the State Belt (U.S. Br. 7). At most, the contention is that if Congress intended the rates of a state operated carrier to be regulated, it would also intend that a state be required

to fix wages and working conditions for its employees by collective bargaining and that any state collective agreement should be policed by federal boards and courts. Such an interpretation of general language built upon an interpretation of other general language, is not a sure foundation for such a fundamental conclusion, unless it can be verified by relevant evidence bearing upon the intention of Congress.[2]

B. REFERENCE IN THE RAILWAY LABOR ACT TO WHAT CONSTITUTES INTERSTATE RAILROADING, DOES NOT SATISFY THE REQUIREMENT THAT THE STATES BE EXPRESSLY NAMED IN RESTRICTIVE STATUTES.

Respondents point out that the Railway Labor Act refers to "common carriers by railroad, engaged in interstate commerce" as distinguished from the person, corporation, or other entity, operating the carrier. Hence, say respondents, the test is a functional one only (Resp. Br. 14-15), which, they imply, precludes any need for considering other factors bearing upon congressional intent. If the functional test is valid at all, the real frame of reference is to the carrier as an employer of interstate railroad labor. The act is replete with references to "a carrier or car-

[2]The Alaska Railroad is owned and operated by the federal government under the jurisdiction of the Interior Department. Tariffs have been set by the Interstate Commerce Commission (*U.S. v. Berger*, 66 F.Supp. 950, 952) and "working agreements" covering various classes of employees have been made (Rhyne, Labor Unions and Municipal Employe Law; 1946, p. 143). If disputes or claims were filed with the Adjustment Board in Chicago, we speculate as to what the position of the Solicitor General would be on the amenability of the United States to the jurisdiction of the Board and enforcement of the Board's awards against it, in the federal courts. By the argument made here, the federal carrier would come within the definition of carrier in the Interstate Commerce Act and, therefore, subject to the Railway Labor Act and the Adjustment Board's jurisdiction.

riers and its or their employees'' (45 U.S.C. sec. 152, Second, Third, Fourth, Sixth, Eighth, Ninth; sec. 153, First (h), (i), Second). But where a statute generally describes the function being performed, the problem still remains of determining whether or not Congress intended to include government as one of the performers of the function. In *U. S. v. United Mine Workers*, 330 U.S. 258, the term ''employer'' in the Norris-LaGuardia Act (47 Stat. 70, 29 U.S.C. sec. 101 et seq.) and in *U.S. v. Wittek*, 337 U.S. 346, the term ''landlord'' in the District of Columbia Emergency Rent Act (55 Stat. 788), were also functional terms and yet the Court, in each case, proceeded to consider all factors concerning the legislation in order to determine if Congress intended the statute to apply to government. As pointed out by petitioner (Br. 26), the Safety Appliance Act (45 U.S.C. sec. 1 et seq.), also uses the term ''every common carrier by railroad'' without regard to the identity of the owner or operator. Yet, in *U.S. v. California*, 297 U.S. 175, the Court was not content to rely either upon the broad language covering generally all interstate railroad carriers or upon a functional test. The act's purpose; the dangers apprehended, and the necessity for application to state, as well as to privately owned carriers, were the touchstones of decision.

1. All authorities interpret statutes requiring employers to engage in collective bargaining as not being applicable to government.

Essentially, the Railway Labor Act requires common carriers by railroad, engaged in interstate commerce, to engage in collective bargaining with the representatives of their employees and provides for settlement of dis-

putes. Even where, as here, public agencies fall completely within general definitions, the courts have unanimously construed statutes requiring employers to collectively bargain, as not applying to public employment. (Cases cited Pet. Br. 29-32; Rhyne, Labor Unions and Municipal Employe Law, Supp. Report 1949, pp. 15-18; 31 A.L.R. 2d 1142, 1149.)

For the first time it is being asserted that Congress would or could regulate and police a state's employer-employee relationship. Certainly, the Court will not be content to announce that Congress so intended, upon a wording so ingeniously employed by respondents and the United States. California has approached the problem in the light of what this Court said in *U. S. v. American Trucking Associations,* 310 U.S. 534 at page 542:

> "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation. There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the

act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" (542-544.)

Petitioner has considered all the criteria usually indicative of legislative intent. The subject matter (Pet. Br. 29), other federal statutes pertaining to the employer-employee relationship (p. 32), the purposes and evils to be corrected (p. 36), history of the act (p. 38), the existence of a need for uniformity or any other compulsive implications that a state must be under the act (p. 38), the unavailability of enforcement and adjudicating procedures of the act against a state (p. 41), and the constitutional doubts concerning congressional power to control a state's employer-employee relationship either under the commerce or judicial power (p. 51). All these judgment factors converge to show that Congress never intended to impose collective bargaining upon a state. Respondents, instead of answering this overwhelming evidence, simply refer the Court to the opinion of the California District Court of Appeal in *State v. Brotherhoods* (Cal. App.), 220 P. 2d 27, and the dissent of one lone justice, when that case was decided by the California Supreme Court (37 Cal. 2d 412, 422, 232 P. 2d 857, 864, pp. 35-45 Appendix to Pet. for Cert.). The California District Court merely relies upon *United States v. California*, 297

U.S. 175, saying that it is decisive of the main question. There is no consideration by that court of the construction aids suggested by petitioner here.

Essentially, the argument of Justice Carter is that, because other railway acts having employment connotations, have been found applicable to a state operated railroad, namely, the Safety Appliance Act (45 U.S.C. sec. 1; *U.S. v. California,* 297 U.S. 175); the Federal Employers' Liability Act (45 U.S.C. sec. 51; *Maurice v. California,* 43 Cal. App. 2d 270, 110 P. 2d 706), and the Carriers' Taxing Act (26 U.S.C. sec. 3231), *California v. Anglim,* 129 F. 2d (C.A.-9) 455, *a fortiori* the Railway Labor Act is also applicable. This argument is also made by the United States (Br. for U.S. 6-8). The answer appears in Petitioner's Brief (pp. 26-27, 38-40, 63-65).

II.

NO OBJECTIVES OF THE RAILWAY LABOR ACT INDICATE THAT CONGRESS INTENDED THE ACT TO APPLY TO A STATE.

The basic objectives are clearly set forth by the act itself: to avoid interruption of commerce in the form of strikes, by providing for collective bargaining with representatives of employees freely chosen, and for the settlement of disputes through federal adjustment or mediation boards or arbitration (45 U.S.C.—General Purpose, sec. 151a).

Petitioner has shown that the evils to be met, i.e., the strike and the company union, are not referable to public employment (Pet. Br. 26-28). The method—collective

bargaining—is universally held not to be available to public employment (Pet. Br. 29-32). Enforcement procedures for the settlement of disputes are either inappropriate to the relationship between a state and its employees (*State v. Brotherhood,* 37 Cal. 2d 412, 420, 232 P. 2d 857, 863), or are unavailable because of the Eleventh Amendment (Pet. Br. 41-51).

Not being able to find that a state's employer-employee relationship must be controlled in order to fulfill the stated purposes of the act, the Solicitor General argues that Congress might well have intended that every carrier should engage in collective bargaining as that would tend to create uniform rules and working conditions in the national railroad system, and to produce a desirable mobility within the railroad labor force (U.S. Br. 10). While the Solicitor General speculates on what Congress "might well have deemed" the objective of collective bargaining to be, the real inquiry is whether the Court from the general plan of the act can say that necessarily every carrier, including a state carrier, must establish rules and working conditions by collective bargaining with a representative of the crafts of its employees. At the outset, the design of the act does not support the Solicitor General's suggestion, that collective bargaining itself as a method of establishing working conditions in the railroad industry, was one of the purposes of the act. The objective was settlement of disputes through collective bargaining as a means of insuring peace in the national railroad system. The suggestion that Congress required collective bargaining as a means of fostering the adoption of working rules consonant with the special circumstances and traditions

of the railroad industry (U.S. Br. 10) is put aside by this Court in *Terminal R.R. Assn. v. Brotherhood of R.R. Trainmen*, 318 U.S. 1:

> ". . . The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix *generally applicable standards for working conditions*. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce. . . ." (p. 6.) (Emphasis added.)

The idea is posed that Congress sought to encourage negotiation with union officers who are intimately acquainted with railway problems and traditions. The Railway Labor Act does not compel employees to designate representatives for collective bargaining purposes nor does it compel agreement (*Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 548). Quite possibly, civil service employees of a public carrier might not wish to organize for establishing their working conditions by bargaining under the Railway Labor Act, being content with civil service techniques for fixing wages and conditions (Pet. Br. 8).

Another thought is that Congress might have contemplated collective bargaining by carriers "of an integrated national system" and railway brotherhoods "national in scope" which would "minimize conflict and disharmony" with respect to wages and working conditions. The provisions of the act contain no such implication. Each

railway carrier and each representative of a craft or class on each railroad property is left to work out its individual agreement. ". . . the act makes no provision for industry-wide collective bargaining." (Natl. Med. Bd., 21st Ann. Rep., 1955, p. 14). "There are approximately 1,200,000 employees of the 710 common carriers by rail. . . . These employees are covered by many thousands of labor agreements." (Report, *supra*, p. 2). Some 5,190 railroad labor agreements, negotiated under the act, were on file with the National Mediation Board in the fiscal year 1956. The majority are with national unions. A substantial number are held by system associations. Some by local unions. However, the same craft may be represented by different unions on different properties (Natl. Med. Bd., 22nd Ann. Rep., 1956, Table 8, p. 58). As the National Mediation Board states:

> "The collective bargaining unit under the Railway Labor Act is the '*craft* or *class*' of employees on the *individual* carrier, regardless of whether the carrier is a terminal or a switching company whose operations are confined to a single city, or whether the carrier's lines extend through many States. . . ."
>
> "Generally, the representation and collective bargaining rights for these separate crafts or classes of employees are held by separate and independent unions, and separate contracts are negotiated for each craft or class." (Natl. Med. Bd., 21st Ann. Rep., p. 2). (Emphasis added.)

Recognition of an exclusive bargaining agent, chosen by a majority of each craft or class on a carrier—a basic part of the act (45 U.S.C. sec. 152, Fourth)—is universally recognized as incompatible with legal rules governing pub-

lic service (Rhyne, Labor Unions and Municipal Employe Law, 1946, pp. 151-152). The union shop provisions (45 U.S.C. sec. 152, Eleventh) are also deemed to be unworkable (*City of L. A. v. Los Angeles etc., Council,* 94 Cal. App. 2d 36, 210 P. 2d 305).

It is contended that another congressional objective in requiring every carrier to collectively bargain was to "permit a desirable mobility within the railroad labor force" (U.S. Br. 10). No provision in the act facilitates the movement of railroad labor within the industry. Employment rights, such as seniority and accumulated sick leave, are not transferable from one carrier to another, upon change of employment. Such an interchange of rights, to be achieved by collective bargaining, was not contemplated and has not been secured through collective bargaining in the railroad field.

As a state owned carrier doesn't fit the frame of the act in all the other aspects, either factually or legally, we submit that a state carrier should not be read into the act upon the tenuous theory that Congress might have required railroad employers to engage in collective bargaining, as a means of bringing about greater uniformity of working conditions.

Respondents refer to the many railroads in the country owned and operated by states or their political subdivisions (Resp. Br. 15). Later, they list some 30 railroads as being owned by states or their municipalities (Resp. Br. 49). Actually, but 11 of these roads are *operated* by states or public entities. Operation is the determining factor when assessing the impact of the number of roads which might not be subject to the Railway Labor Act. The

total trackage operated—362 miles—is an infinitestimal amount compared to the total trackage of privately operated railroads (I.C.C. 69th Ann. Rep.). The rest are either operated by private corporations, in which a public body has some stock interest, or they are under long term lease. For example, the Cincinnati Southern Railway, owned by the City of Cincinnati, is under lease to the Southern Railway for 99 years from January 1, 1928 (I.C.C. 69th Ann. Rep., p. 556, No. 461). There were scarcely enough of such publicly operated railroads to engage the attention of Congress, as the respondents suggest (Resp. Br. 49-50).

At this point we might observe that considering the small number of publicly operated carriers which are either switching or terminal roads, Congress would have little concern with imposing the collective bargaining method on them as a means of fostering uniform rules or national wage and rule agreements. The advantage, if any, to be gained by imposing the foreign system of establishing working conditions by collective bargaining upon a state would appear small, as against the unprecedented assertion by Congress of control of a state's employer-employee relationship. The retention by a state of its traditional method of fixing terms of employment, by statute and regulation (in this case by civil service), would have no adverse effect upon the general effectiveness of having private carriers engage in collective bargaining.

The Solicitor General argues that Congress might well have deemed this system of collective bargaining "more advantageous, both for the owning state and for its railroad employees, than application to these employees of

a civil service system necessarily framed in relation to totally different types of work and employment (U.S. Br. 10). On the other hand, assuming Congress put its mind to the matter, strikes which collective bargaining was designed to prevent are practically, if not entirely, non-existent in state operations. Craft or class characteristics whether they concern railroad or harbor employees, bus drivers, carpenters, etc., are continually being considered by state and municipal personnel boards or commissions when classifying positions or fixing wages on the basis of existing rates, *e.g.*, California Government Code sections 18858 and 18853. Furthermore, this is often done by conferences with representatives of the crafts and rules and wages set without the counter pull of stockholders seeking their share of the profit dollar.

If Congress were so intent upon achieving industry-wide uniformity of wages and working conditions through the universal use of collective bargaining in railroad commerce, it would seem logical that the minimum base for such bargaining—the Fair Labor Standards Act (29 U.S.C. secs. 201-219) which applies to privately owned carriers (*Rockton etc. R. Co. v. Walling*, 146 F. 2d (C.C.A.-4) 111), would also have been made applicable to publicly operated carriers. It was not (*Creekmore v. Public Belt R. Com.*, 134 F. 2d (C.C.A.-5) 576, 577, 578; Pet. Br. 34).

A. IT IS NOT ESTABLISHED THAT CALIFORNIA HAS OPERATED SUCCESSFULLY OR OTHERWISE UNDER THE 1942 CONTRACT, OR THAT PUBLIC EMPLOYMENT IN THE RAILROAD FIELD CAN BE CARRIED OUT BY COLLECTIVE BARGAINING.

In answer to petitioner's contention (Pet. Br. 30-38) that the establishment of wages and working conditions

by collective bargaining are repugnant to concepts of public employment, the Solicitor General contends that the very facts here, show that it can and has been done. "The Belt Railroad was operated for more than 9 years—from September 1, 1942 to November 13, 1951—upon the basis that it was subject to the Railway Labor Act, and no showing has been made that such operation gave rise to legal or practical difficulties." (U.S. Br. 11.)

The contrary is the fact (*supra* pp. 1, 2). The legal difficulties are reflected in the litigation in the trial and Appellate Courts of California (*State v. Brotherhood, etc.*, 37 Cal.2d 412, 232 P.2d 857). The practical difficulties which the succeeding Harbor Board experienced between the conflicting demands of state civil service and those of the contract, appear, in part, in the present dockets before the Board. Even treating the contract as valid, the employees were partly under civil service and partly under the contract. When conflict developed, the Harbor Board adhered to civil service. As a result, the disputes pending in the present dockets arose (Pet. Br. 7).

As a general matter, California naturally seeks to maintain the integrity of its civil service system, which, but for a small number of exempt officials and confidential secretaries, applies to every employer in the state. Petitioner believes, too, that, from the standpoint of its State Belt employees themselves, the civil service system has superior advantages to the wage and working conditions which have been produced in the railroad industry by collective bargaining (Pet. Br. 5, 8).

While, as the Solicitor General points out, the number of State Belt employees is small compared to the total

number of state employees (U. S. Br. 11), still, it is an annoying incongruity that California would have to collectively bargain with its State Belt employees at San Francisco Harbor, while, because of the exemption in the Labor Management Act (Pet. Br. 33), its other harbor employees can remain under civil service (Pet. Br. 33-34).

While the brief for the United States suggests that "collective bargaining with reference to public employment is no rarity" (p. 12), the California Supreme Court has said:

> "Recent authorities hold uniformly that the wages, hours and working conditions of government employees must be fixed by statute or ordinance. . . ." (37 Cal.2d 412, 417, 232 P.2d 857, 861.)

The opinion of the Courts and authorities are overwhelmingly to the effect that the states and their political subdivisions do not and cannot have the authority to establish working conditions for public employees through collective bargaining (Rhyne, Labor Unions and Municipal Employe Law, 1946, Conclusions 3, 7, pp. 150-152; Supp. Rep.—1949—Conclusion 2, p. 56). Aside from some very limited situations, usually involving public corporations with broad powers, the federal government does not, and possibly cannot, establish working conditions by collective bargaining in the manner provided in the Railway Labor Act. No more forceful statement has been made on the subject than that given by President Franklin D. Roosevelt, setting forth the "insurmountable limitations" upon the use of the collective bargaining process in public service (*City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W. 2d 539, 542-543; Rhyne, *supra* pp. 436-437).

III.

CONTRARY TO RESPONDENTS' SUGGESTION, THE ELEVENTH AMENDMENT IS A SPECIFIC LIMITATION ON THE POWERS OF CONGRESS.

Respondents do not question California's analysis (Pet. Br. 41-51) that Congress relied upon an exercise of the federal judicial power at the instance of private parties as an essential device for the accomplishment of the purposes of the Railway Labor Act, nor do they argue that employment of this power against state-owned and operated railroads, such as the California Belt Line, would not constitute a suit against the State. Respondents' sole reply to these contentions of California rests on the sweeping and novel assertion that Congress in the exercise of a granted power, in this case the commerce power, may abrogate the Eleventh Amendment and confer jurisdiction on the federal courts over actions by private parties against a state (Resp. Br. 42-48).

Apparently unable to adduce direct support for this proposition from either precedent or principle, respondents attempt to create a spurious implication that the immunity guaranteed to the states by the Eleventh Amendment has been regarded with disfavor and limited by this Court at every opportunity. The suggestion, by inference at least, is that this Court should seize upon any pretext to emasculate the Eleventh Amendment in order to be consistent with the trend of its prior decisions. In fact, however, this Court's historical treatment of the Eleventh Amendment has been far from a uniformly narrow one. Indeed, if one wishes to analyze the trend of decision, it becomes necessary to clearly distinguish between two basic

concepts. On the one hand, there has been a tendency to limit the scope of the word "state" and the number of persons or entities which may bring themselves within the protective magic of the word. On the other hand, the Court has repeatedly resisted attempts to infringe the measure of immunity afforded where the conclusion is once reached that the action is, in fact, one against a state. The area within the curtilage has been restricted but the impermeability of the barricade itself has been steadfastly maintained. Thus, there have been many cases in which claims of immunity under the Eleventh Amendment have been denied on the theory that the suits were not in fact against states (*Bank of the U.S. v. Planters' Bank of Georgia* (1824), 22 U.S. (9 Wheat.) 904 and *Bank of Kentucky v. Wister* (1829), 27 U.S. (2 Pet.) 318 (state owned corporations); *Lincoln County v. Luning* (1890), 133 U.S. 529, and *Old Colony Trust Co. v. Seattle* (1926), 271 U.S. 426 (cities and counties); *Hopkins v. Clemson Agricultural College* (1911), 221 U.S. 636 (public corporation); *Georgia R.R. and Banking Co. v. Redwine* (1952), 342 U.S. 299, *Ex Parte Young* (1908), 209 U.S. 123; *Reagan v. Farmers' Loan & Trust Co.* (1894), 154 U.S. 362; *Tindal v. Wesley* (1896), 167 U.S. 204; (state officers acting without valid legal authority)). The cases relied on by respondents are principally of this category.

Where the judgment or order contemplated by the action, however, would require payment from the state treasury, or would directly affect the property or financial interests of the state, or would command the exercise of discretionary authority vested in an officer by virtue of

his embodiment of the state's sovereignty, the suit is deemed to be one against the state (*Ford Motor Co. Dept. of Treas.* (1945), 323 U.S. 459; *Great Northern Life Ins. Co. v. Read* (1944), 322 U.S. 47; *Smith v. Reeves* (1900), 178 U.S. 436; *Hagood v. Southern* (1886), 117 U.S. 52; *Louisiana v. Jumel* (1883), 107 U.S. 711).

In cases where the preliminary conclusion has been reached that the suit is in fact against a state, the immunity has been sustained by this Court against all attempts to infringe or circumvent it. Though the amendment in its literal wording applies only to suits against a state by citizens of *another* state, it has been broadly construed to provide immunity where the suit was by a citizen of the defendant state (*Hans v. Louisiana* (1890), 134 U.S. 1), by a foreign sovereign (*Monaco v. Mississippi* (1934), 292 U.S. 313), and by a state acting as collection agent for its own citizens (*New Hampshire v. Louisiana* (1883), 108 U.S. 76). Moreover, the fact that in many of the cases the subject of the action as a case arising under the Constitution of the United States rather than the identity of the parties would have been the predicate of federal jurisdiction in the absence of the Eleventh Amendment has never been deemed material. (*Hans v. Louisiana* (1889), 134 U.S. 1). An early suggestion that immunity attached only where the state was named as a party of record (*Osborn v. Bank of United States* (1824), 22 U.S. (9 Wheat.) 737, 850-858), was shortly repudiated (*Governor of Georgia v. Madrazo* (1828), 26 U.S. (1 Pet.) 110, 120-123), and since that time the proper inquiry in ever case has been whether the action is in substance against the state (*Smith v. Reeves* (1899), 178 U.S. 436, 438). And,

although the amendment speaks only of suits "in law or equity", it has been given effect as a limitation on the admiralty jurisdiction (*Ex parte New York* (1920), 256 U.S. 490, 497).

A suggestion that the state lost its immunity by directly engaging in a proprietary, as distinguished from a governmental, activity was rejected in *Murray v. Wilson Distilling Co.* (1909), 213 U.S. 151. Finally, an earlier tendency to judicially broaden state consent statutes framed in general language but not expressly authorizing suit in the federal courts was abandoned by later decisions which require a clear expression of such consent, at least in cases involving the state's financial affairs (*Compare Reagan v. Farmers' Loan & Trust Co.* (1893), 154 U.S. 362, 391-392, *with Great Northern Life Ins. Co. v. Read* (1944), 322 U.S. 47, 53-57 and *Kennecott Copper Corp. v. State Tax Com.* (1946), 327 U.S. 573, 577).

These cases demonstrate the error in any suggestion that the sovereign immunity of the states, insofar as the federal judicial power is concerned, has been whittled away by this Court to a point where the proposition advanced by respondents can be regarded as merely the culmination of a natural trend of decision. To suggest that the principle of the Eleventh Amendment died with the Nineteenth century is to ignore the vitality accorded the constitutional limitation by recent decisions of this Court. The proposition asserted by respondents is an astounding one, the acceptance of which would require the repudiation of the Court's historical attitude toward the Eleventh Amendment.

But this is scarcely the gravest implication of respondents' position. The Eleventh Amendment is a specific limitation upon the judicial power vested in the federal government (*Duhne v. New Jersey* (1920), 251 U.S. 311, 313). As such it is intrinsically a specific limitation not upon the self-assumed powers of the federal courts but upon the powers *which Congress may vest* in the federal courts. The immediate source of the power exercised by the lower federal courts is not Article III, but Congress itself (*Kline v. Burke Const. Co.* (1922), 260 U.S. 226, 233; *Sheldon v. Sill* (1850), 49 U.S. (8 How.) 441, 448; *Cary v. Curtis* (1845), 44 U.S. (3 How.) 236, 244). Thus, every case in which a state's claim of immunity under the Eleventh Amendment has been sustained is in effect a holding that the act of Congress conferring the jurisdiction on the federal courts is invalid. For if there were no appropriate grounds for federal jurisdiction in the absence of the amendment, the Court presumably would not have found it necessary to reach the question of immunity.

The Eleventh Amendment, therefore, is a specific limitation on the power of Congress. It is as fallacious to suggest that it is subservient to the commerce clause as it would be to assert that the limitations imposed by the First or the Fifth Amendments must yield to the overweening sweep of the commerce power. Respondents' view ignores the fact that the Eleventh Amendment is, after all, a part of the Constitution.

By the same token respondents' emphasis on the supremacy clause and its implications as to the precedence of federal law in any conflict with state interests is misplaced. The question in this case is not as to the supremacy

of federal law over state law, but as to the supremacy of the specific constitutional limitations on Congressional power and their significance in ascertaining the intent behind general language in an act of Congress.

The only real question in any case involving a claim of immunity is whether the action is in fact against the state. No clearer instances of actions which would be in substance against the state can be imagined than those contemplated for the enforcement of the Railway Labor Act. Suits on Adjustment Board awards frequently result either in money judgments which would be payable from the state treasury or in injunctions affirmatively commanding the state to alter the relationships among its servants. All of the claims involved in the present proceeding, except possibly one, seek money awards. (Pet. Br., pp. 6-7). Moreover, nothing could be more fundamentally a suit against a state than a proceeding designed ultimately to force the state legislature to abandon its powers over the rates of pay, qualifications, and other terms of employment of state employees and provide for the establishment of these conditions by collective bargaining.

IV.

RESPONDENTS CONTEND THAT A STATE'S EMPLOYER-EMPLOYEE RELATIONSHIP CAN BE CONTROLLED BY THE FEDERAL GOVERNMENT IN THE MANNER OF THE RAILWAY LABOR ACT.

If the Court decides that the Railway Labor Act is applicable to the state, then the constitutional issue is joined (Pet. Br. 51-61). The right of the states as constituent parties of the Union to choose and set terms of employ-

ment for officers and employees carrying out state functions, free from interference of the federal government, has always been recognized as a fundamental concept of the federal plan. It is basic to the republican form of government which the central government is constitutionally bound to guarantee (U. S. Const. art IV, sec. 4).[3]

It is difficult to perceive how the states may continue to exist as independent agencies of the constitutional plan, if Congress, under the commerce power, may control a state's employer-employee relationship (cf. *Johnson v. Maryland*, 254 U.S. 51, 57). The very existence of states often determines interstate commerce itself and what states do, affects it. Yet, respondents contend that Congress under the commerce power and supremacy clause may require a state to manage its relationship with its employees pursuant to the Railway Labor Act. The other side of the coin, is that the requirements of this act and the federal policing of the employment relationship, impinges upon the hitherto acknowledged right of the people to set the conditions upon which their employees will carry out state functions.

The authorities cited by respondents in support of respondents' contention concern, for the most part, the exercise of the federal taxing power. None of the authorities cited touch on the state as an employer (Resp. Br. 31-42). Respondents place almost final and conclusive reliance on *U. S. v. California*, 297 U.S. 175, and the Solicitor General declares that the case "puts at rest the constitutionality

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[3]"The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or the Executive (when the Legislature cannot be convened) against domestic Violence." (U.S. Const. art. IV, sec. 4).

of the Railway Labor Act as applied to the Belt Railroad." (U.S. Br. 13.) It would require the ardor of advocacy to fail to see that, in the exercise of control over interstate railroad commerce, there is a distinction between requiring safety appliances on railroad cars and controlling and policing the employment relationship through which state employees carry out legitimate functions of a state in interstate commerce.

Perhaps it will be unnecessary for the Court to reach the basic and hitherto unsettled constitutional question, because respondents place their claim that the federal government has the right to subject the State Belt to the controls of the Railway Labor Act, upon the following proposition:

> "A state which chooses to engage in what are normally private enterprises as contrasted with its traditional governmental functions, is subject to regulation by the Federal Government." (Resp. Br. 31).

While California in the operation of the State Belt is engaged in a proprietary function, the matter of a state's relationship with its employees, regardless of the activity in which the employees are engaged is governmental in character (Pet. Br. 59-60). This is clearly indicated by *Nutter v. City of Santa Monica,* 74 Cal. App. 2d 292, 302, 168 P. 2d 741, 748; *City of Los Angeles v. Los Angeles etc., Council,* 94 Cal. App. 2d 36, 45-46, 210 P. 2d 305, 311; *City of Springfield v. Clouse,* 356 Mo. 1239, 206 S.W. 2d 539. The California Supreme Court declared, with respect to the situation now before the Court:

> "We find no legitimate reason for making any distinction in the present case between governmental and

proprietary functions of the state." (*State v. Brotherhoods*, 37 Cal. 2d 412, 420-421, 232 P. 2d 857, 863).

V.

EVEN IF THE RAILWAY LABOR ACT REQUIRES A STATE TO COLLECTIVELY BARGAIN, RESPONDENTS FAIL TO SHOW THAT THEIR CLAIMS ARE BASED UPON A VALID CONTRACT.

The Railway Labor Act provides for the negotiation of employment contracts. The act, however, does not change the principles of contract law that an agent must have *authority* to bind his principal. It is evident that the Harbor Board had no authority to negotiate the present contract on behalf of the state (Pet. Br. 66-69). In fact, respondents re-emphasize the conclusion by stating that "the Harbor Board has no authority to bargain *to a conclusion* on any subject" (Resp. Br. 20). The civil service laws to which respondents refer, merely demonstrate, not only the absence of an over-all authority to make a collective bargaining contract, but that, as to a number of particular matters such as promotions and layoffs, specifically there was no authority to bind California to the conflicting provisions in the contract (Pet. for Cert. 84).

However, respondents contend that the civil service laws were an impediment to the collective bargaining process (Rep. Br. 17). What is the result? California, because of these laws, had not designated anyone to establish working conditions for its State Belt employees, and, in fact, by its civil service laws had precluded bargaining entirely. However, that does not give validity to the present contract made by unauthorized persons. Voluntary agree-

ment is the essence of the act (Natl. Med. Bd. 21st Ann. Rep., 1955, p. 4). Hence, up to the present time, the most that has occurred, is that California has not complied with the provisions of the act requiring a carrier to designate representatives "authorized" to "confer," and because of the restrictions of civil service statutes, has not engaged in collective bargaining with representatives of its State Belt employees for the purpose of establishing rates of pay, rules and working conditions (45 U.S.C. sec. 152, First, Second). Without considering the problems posed by the fact that the carrier is a state, these obligations may be enforced by injunction (*Virginian Railway Co. v. System Federation No. 40,* 300 U.S. 515).

If any agency other than the legislature would have implied powers to discharge the state's obligation to collectively bargain, it is and was the State Personnel Board, which is given full jurisdiction concerning rates of pay and working conditions (Calif. Gov. C. secs. 18702-18714). Otherwise, if California refuses to bargain, the act provides for taking the dispute to the Mediation Board (45 U.S.C. sec. 155). In any event, if California is to be required to collectively bargain, it should have an opportunity to empower its representatives to act for it, free of the limitations presently imposed by civil service laws.

CONCLUSION.

Respondents have not demonstrated that the Railway Labor Act expressly includes the states. Nor have they produced affirmative reasons for believing that Congress intended the act to require a state to give up its tradi-

tional method of establishing working conditions for its employees by statute and to substitute therefor, collective bargaining—something foreign to state public service. The Eleventh Amendment cannot be overridden by the commerce power, as respondents suggest. Since judicial action by private parties for the enforcement of rights is a basic part of the act, it is not likely that Congress intended the act to apply to a state.

Despite the full sweep of the commerce power, there is an implied limitation that Congress cannot employ it to the extent of controlling a state's intrinsic right to select the terms upon which its officers and employees will carry out state functions. Even if the act applies to a state, there is no valid contract upon which the Adjustment Board's jurisdiction may rest, for the instant contract upon which respondents' claims are based, was not executed by state officers empowered by California to engage in collective bargaining with the representative of respondents.

Petitioner respectfully suggests that the conclusion remains that the judgment should be reversed.

Dated, March 29, 1947.

Respectfully submitted,

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